

Secession within the Union
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of EU Membership
Simone F van den Driest**

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Intersection points of International and European Law

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Some Thoughts on the Viability of EU Membership

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1. Introduction

In a number of European Union (EU) Member States, the issue of secession has recently emerged on the political agenda. In 2013, the Scottish Parliament approved to hold a referendum on Scotland's independence from the United Kingdom (UK) on 18 September 2014, with the consent of the UK government in Westminster.¹ Likewise, Catalonia's Parliament has decided to organize a referendum on Catalonia's independence from Spain on 9 November 2014, albeit without the approval of the Spanish government. The request by the Catalan authorities to hold such referendum was rejected by an overwhelming majority of the Spanish Members of Parliament earlier this year.² Despite this fundamental difference as regards their respective central governments' stance or strategy towards the issue of independence, the cases of Scotland and Catalonia have in common that both entities aspire to secede from their parent State, but remain part of the EU at the same time. These developments raise a variety of interesting questions of both international and European law. The secession of part of the territory of a EU Member State with the newly established State seeking to retain EU membership is unprecedented.

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¹ Following the so-called Edinburgh Agreement, which was signed by Scottish First Minister Alex Salmond and UK Prime Minister David Cameron and gives Scotland the powers to hold a referendum, the Scottish Parliament approved the terms of the plebiscite in: Scottish Independence Referendum Bill, SP Bill 25B, 27 June 2013, <http://www.scottish.parliament.uk/S4_Bills/Scottish%20Independence%20Referendum%20Bill/b25bs4-aspassed.pdf> accessed 30 June 2014.

² On 8 April 2014, the Spanish Parliament rejected the Catalan request to hold a referendum on Catalonia's independence on 9 November 2014 by 299 votes against, 47 votes in favor and one abstention. See BBC News, 'Spanish Parliament Rejects Catalan Independence Vote' (8 April 2014) <<http://www.bbc.com/news/world-europe-26949794>> accessed 30 June 2014.

To date, non-State entities gaining independence from EU Member States has primarily occurred in the decolonization context and has always led to the withdrawal of the newly independent State from the European Union. Examples in this respect are the independence of Algeria from France and the independence of Congo from Belgium. Hence, a prominent legal question is whether a newly established State can automatically continue its membership of the EU, or whether the new State is required to (re)apply for EU membership.

This post aims to shed some light on this issue and, more specifically, highlight a couple of pertinent factors that are of interest with respect to EU membership following 'secession within the Union'. To that end, this post will first address the question of EU membership from the perspective of international law, as the EU functions as a 'classical' international organization in this respect. In doing so, the legal opinion by professors James Crawford and Alan Boyle on the international law aspects of Scottish independence will be used as a convenient starting-point for the discussion. Assuming that an application for EU membership by the newly constituted State is required, this post will subsequently consider two factors that may influence the viability of such applications: the importance of parent State consent and the presence of secessionist entities within other existing Member States.

2. Secession within the Union and EU membership

In view of the envisaged Scottish independence referendum, James Crawford and Alan Boyle were asked to advise the UK government on the international law aspects of a possible negotiated independence.³ In their 2012 opinion, three possible legal outcomes of Scottish independence were explored. The possibilities of the dissolution of the UK, which would give rise to the emergence of two new States, and a reversion of the Scottish State as it existed before the 1707 union with England, were both dismissed as unrealistic.⁴ The third possible outcome would involve the separation of Scotland from the UK, which would give rise to a new State (i.e., Scotland, also referred to as the successor State) and the continued existence of the remainder of the UK (England, Wales and Northern Ireland, referred to as the continuator

³ J Crawford SC and A Boyle, *Annex A. Opinion: Referendum on the Independence of Scotland - International Law Aspects* (10 December 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf> accessed 30 June 2014.

⁴ *ibid*, paras 71-94, 95-115.

State).⁵ This was considered to be the most likely one in view of State practice with respect to the creation of States in international law.

Taking this scenario as their starting point, Crawford and Boyle considered the issue of succession to membership of international organizations. As they rightly pointed out, international law provides that this issue is regulated by the relevant rules of a particular organization. However, leaving aside exceptions such as the IMF and the World Bank, most international organizations do not have specific rules regulating the issue of succession to membership. In practice, they usually allow the continuator State to retain its membership, while requiring the newly established State to submit its own membership application. Although refuted by the Scottish government,⁶ this scenario seems to apply to the European Union as well. As the President of the European Council, Herman Van Rompuy, noted in reply to a question about the situation of Catalonia:

The separation of one part of a Member State or the creation of a new State would not be neutral as regards the EU Treaties. The European Union has been established by the relevant treaties among the Member States. The treaties apply to the Member States. If a part of the territory of a Member State ceases to be part of that state because that territory becomes a new independent state, the treaties will no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the Union and the treaties would from the day of its independence, not apply anymore on its territory.⁷

The President of the European Commission, José Manuel Barroso, made a similar statement in the context of Scotland's independence.⁸ This supports the conclusion that States which have emerged through the secession from existing EU Member States, will not remain within the Union automatically, but have to apply for EU membership in their own right instead. The accession of aspiring Member States is regulated by Article 49 Treaty of the European Union (TEU), which prescribes that a State can only accede to the EU if the relevant EU bodies deem

⁵ *ibid*, paras 50-70.

⁶ The Scottish Government, *Scotland in the European Union* (27 November 2013) <<http://www.scotland.gov.uk/Resource/0043/00439166.pdf>> accessed 30 June 2014, paras 3.5-3.10.

⁷ Council of the European Union, 'Remarks by President of the European Council, Herman Van Rompuy, on Catalonia' (12 December 2013) EUCO 267/13, PRESSE 576, PR PCE 241.

⁸ BBC News, 'Scottish independence: EC President José Manuel Barroso on new states membership' (12 September 2012) <<http://www.bbc.com/news/uk-scotland-scotland-politics-19567650>> accessed 30 June 2014.

membership in accordance with certain procedural and substantive requirements. Crucially, a treaty of accession must be signed and ratified by *all* existing Member States. This means that, legally speaking, every Member State has a 'veto' to block the admission of new States to the EU.

3. The viability of an application for EU membership

Assuming that a successor State would indeed have to apply for EU membership in its own right, the next important step is to consider the viability of such application in cases of 'secession within the Union'. In this respect, the stances of existing EU Member States are vital. Their attitudes and, accordingly, the course of negotiations will be determined by a variety of factors, which may be legal, (geo)political and/or economic in nature. Two factors that deserve to be singled out in this regard concern the consent of the parent State and the presence of secessionist entities within other existing Member States.

3.1. The consent of the parent State

First, some remarks deserve to be made about the importance of the modality of State creation and, more specifically, the consent of the parent State in decisions on membership applications. As was explained above, Article 49 TEU requires the unanimous approval of accession to the EU by all existing Member States. Consequently, a State that has emerged as a consequence of unilateral secession will probably not be admitted to the EU, due to a negative vote ('veto') by its parent State. In the context of the EU, however, it is questionable whether a parent State will be able to sustain its opposition to EU membership of a State that has seceded unilaterally. Significant economic motives and trade interests, in particular, may induce the parent State to agree to the admission of the new independent State to the EU in the end. Therefore, it is relevant to consider the responses of other Member States as well. In the absence of any precedents within the framework of the EU, the practice of the United Nations (UN) may provide for some useful insights in this respect. While the procedural and substantive requirements for admission to the UN differ from those of the EU, UN practice may be relevant as the organization has witnessed numerous States emerging from existing UN Member States that subsequently sought to be admitted to the UN in their own right.

When looking at the admission of newly proclaimed States to Membership of the UN, the modality of State creation and the consent of the parent State have always played a prominent part. State

practice demonstrates that beyond the context of decolonization (i.e. situations covered by Chapter XI or Chapter XII of the UN Charter), UN Member States have been very reluctant to admit entities that have been created as a result of unilateral secession. As was observed by Crawford, “no new State formed since 1945 outside the colonial context has been admitted to the United Nations over the opposition of the [continuator] State”.⁹

The position typically adopted by UN Member States can be usefully illustrated by contrasting the experience of Bangladesh in the early 1970s with the more recent creation of the State of South Sudan. On 10 April 1971, East Pakistan (currently known as Bangladesh) unilaterally declared itself independent from West Pakistan (now Pakistan) after decades of domination and large-scale military actions by the central authorities to violently suppress its demand for autonomy and independence. Eventually, India intervened to fight the forces of West Pakistan. The newly proclaimed State of Bangladesh sought to accede to the UN in 1972,¹⁰ but was not admitted at first.¹¹ Only after the troops of the West were defeated and Pakistan had given its tacit consent by recognizing Bangladesh in 1974 was the latter State admitted to the UN.¹² By that time, Bangladesh was no longer under the control of Pakistan and no territorial counterclaim was upheld. As such, this example of unilateral secession demonstrates the unwillingness of UN Member States to admit an entity as long as the parent State opposes its emergence as an independent State. In contrast, South Sudan emerged as an independent State in 2011 after the central authorities of Sudan had agreed to respect the outcome of the referendum on independence. The referendum was held under the terms of the 2005 Comprehensive Peace Agreement, which was signed between the government of Sudan and the Sudan Peoples’ Liberation Movement/Sudan Peoples’ Liberation Army.¹³ Given the express consent of its parent State, South Sudan did not emerge as an independent State as a result of a successful attempt at unilateral secession, but instead as a consequence of consensual secession. In view of its consensual mode of creation, South Sudan was admitted to

⁹ J Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 415.

¹⁰ See UNSC, ‘Application of the People’s Republic of Bangladesh for admission to membership in the United Nations: Note by the Secretary General’ (8 August 1972) UN Doc S/10759.

¹¹ UNSC Draft Res S/10771 (23 August 1972) UN Doc S/10771.

¹² UNSC Res 351 (1974) (10 June 1974) UN Doc S/RES/351 (1974); UNGA Res 3203 (XXIX) (17 September 1974) UN Doc A/RES/2010 (XXIX).

¹³ See ‘Southern Sudan Referendum Commission’ <<http://southernsudan2011.com>> accessed 30 June 2014.

the UN without opposition as its 193rd Member State on 14 July 2011.¹⁴ The example of South Sudan shows that States that have been created with the express consent of the parent State are generally admitted to the UN rapidly.

So in general, outside the context of decolonization, a new State will only be admitted to the UN when the parent State consents to – or at least no longer opposes – the separation of part of its territory. The opposite appears to hold true when the parent State maintains a territorial counterclaim. This State practice affirms the value that is generally ascribed to the principle of territorial integrity.¹⁵ In view of the fact that EU Member States are also members of the UN, it stands to reason that they will act along these lines when deciding on applications for EU membership. A secessionist entity and its parent State will probably have to solve their issues on a bilateral level first, before an EU membership application by the new State will be considered.

3.2. The presence of secessionist entities within existing Member States

In addition to the relevance of parent State consent, another factor that may influence the viability of an application for EU membership following ‘secession within the Union’ concerns the significance of domestic political considerations and, in particular, the presence of secessionist entities within other EU Member States not directly involved in the secession at hand. Often, the position of States on independence questions is influenced by their own domestic political situation, with States having active secessionist entities on their territory generally more reluctant to approve or recognize secessionist attempts in other States, for fear of being taken to implicitly condone or even encourage similar attempts at home. The international responses to Kosovo’s unilateral declaration of independence and its attempt to secede from Serbia illustrate this. For example, Argentina, Azerbaijan, China, and Spain – States dealing with secessionist groups on their respective territories – have all refused to recognize Kosovo, while emphasizing the value of the principle of respect for the territorial

¹⁴ UNSC, ‘Report of the Committee on the Admission of new Members concerning the application of the Republic of South Sudan for admission to membership in the United Nations’ (11 July 2011) UN Doc S/2011/420; UNGA Res 65/308 (14 July 2011) UN Doc A/RES/65/308.

¹⁵ See Crawford (n 9), 417-418.

integrity of States.¹⁶ While such position particularly applies to instances of unilateral secession, for States having active secessionist groups on their territory, even consensual secession (or: negotiated independence) is a highly sensitive issue.

The example of Scotland and its wish to remain part of the EU illustrate the difficulties that may arise in this respect. The UK government has indicated that it will respect the outcome of the referendum to be held on September 18th: “[i]f a majority of those who vote want Scotland to be independent then Scotland would become an independent country after a process of negotiations”.¹⁷ Hence, if the Scottish population will vote for independence, secession will involve a negotiated agreement between the Scottish authorities and the UK government. It is therefore not to be expected that the UK will block or obstruct Scotland’s accession to the EU. Less certain, however, is the stance of the other EU Member States. Will the UK’s approval be sufficient to induce them to approve Scotland’s membership application – or will potential (domestic) costs lead them to a different decision? These are pertinent questions, since the Member States themselves rather than the European Parliament or the European Commission will ultimately decide on the accession of aspirant Members. In this respect, it cannot be ruled out that Spain, for instance, will not consent to Scotland’s accession given the calls for independence by both Catalonia and the Basque Country. What is more, it remains to be seen under which conditions the present EU Member States will let Scotland do so. It may well be that Spain or other States having secessionist entities on their territory will insist on certain conditions for their support to the accession of the aspirant Member State. So in sum, it seems that EU membership following secession within the Union is by no means self-evident and may come at a certain cost.

4. To conclude

This post has explained that when a non-State entity secedes from an existing EU Member State, it is to be expected that the latter State qualifies as the continuator State that continues its membership in the EU, while the seceding entity emerges as a new State that will have to apply for EU membership in accordance with Article 49 TEU. In such

¹⁶ For an analysis of the international responses to Kosovo’s declaration of independence, see SF van den Driest, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?* (Intersentia 2013), 233-275.

¹⁷ UK Government, ‘Scottish Independence Referendum’ <<https://www.gov.uk/government/topical-events/scottish-independence-referendum/about#what-happens-if-there-is-a-yes-vote>> accessed 30 June 2014.

situations, the attitude of existing EU Member States will ultimately determine the viability of an application for EU membership. Two factors that may impact the positions of EU Member States were singled out. It was argued that the consent of the parent State to the secession and the presence of active secessionist entities within existing Member states are important factors with respect to 'secession within the Union'.

When looking at current developments on the European continent, it seems that the absence of consent by the Spanish authorities to the separation of Catalonia will decrease the likelihood that an independent Catalonia will be admitted to the EU in its own right. The first mentioned factor will probably not affect Scotland's accession to the EU, given the (promised) approval of Scottish independence by the Westminster government. Notwithstanding such favorable position by the parent State, however, Scotland's accession process may well be hindered by other EU Member States having active secessionist movements at home and fearing for implicitly condoning or encouraging their attempts to separate. Spain, for instance, may not be willing to approve Scotland's membership of the EU or may impose certain conditions for its approval.

Since the cases of Scotland and Catalonia are unprecedented within the EU, it is difficult to predict to what extent the factors discussed above will actually influence the accession of States emerged through 'secession within the Union'. Time will tell.